



AGENCY FOR INTERNATIONAL DEVELOPMENT

22 CFR Part 212

Freedom of Information Act Regulations

AGENCY: Agency for International Development (USAID)

ACTION: Proposed rule.

SUMMARY: This regulation prescribes the procedures and standards USAID follows in processing requests for records under the Freedom of Information Act (“FOIA”), 5 U.S.C. 552.

The Act requires agencies to review their FOIA regulations, and no later than 180 days after enactment, directed the head of each agency to issue regulations on various elements of its FOIA program.

DATES: Submit comments on or before November 25, 2016..

FOR FURTHER INFORMATION CONTACT: Lynn P. Winston, Bureau for Management, Office of Management Services, Information Records Division, U.S. Agency for International Development, Washington, DC 20523-6601; tel. 202-712-0960, fax: 202-216-3070.

SUPPLEMENTARY INFORMATION: On June 30, 2016, President Obama signed into law the FOIA Improvement Act of 2016. The Act addresses a range of procedural issues that affect agency FOIA regulations, including requirements that agencies establish a minimum of 90 days for requesters to file an administrative appeal, and that they provide dispute resolution services at various times throughout the FOIA process. The Act also, among other things, codifies the Department of Justice’s “foreseeable harm” standard, amends Exemption 5, creates a new “Chief FOIA Officer Council,” and adds two new elements to agency Annual FOIA Reports.

List of Subjects in 22 CFR Part 212:

Freedom of information.

For the reasons stated in the preamble, USAID proposes to revise 22 CFR part 212 to read as follows:

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Subpart A – General Provisions

§ 212.1 Purpose and scope.

This subpart contains the rules that the United States Agency of International Development (hereinafter “USAID” or “the Agency”) follows in processing requests for records under the Freedom of Information Act (“FOIA”), 5 U.S.C. 552. The rules in this subpart should be read in conjunction with the text of the FOIA. Requests made by individuals for records about themselves under the Privacy Act of 1974, are processed under Subpart O. Definitions of FOIA terms are referenced in Subpart L. As a matter of policy, the Agency makes discretionary disclosures of records or information exempt from disclosure under the FOIA whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption, but this policy does not create any right enforceable in court.

§ 212.2 Policy.

- (a) As a general policy, USAID follows a balanced approach in administering the FOIA. USAID recognizes the right of the public to access information in the possession of the Agency. USAID also recognizes the legitimate interests of organizations or persons who have submitted records to the Agency or who would otherwise be affected by release of records. USAID has no discretion to release certain records, such as trade secrets and confidential commercial information, prohibited from release by law. USAID’s policy calls for the fullest responsible disclosure consistent with those requirements of administrative necessity and confidentiality which are recognized under the FOIA.
- (b) *Definitions.* For purposes of subparts A through K, M, and O of this part, *record* means information regardless of its physical form or characteristics including information created,

stored, and retrievable by electronic means that is created or obtained by the Agency and under the control of the Agency at the time of the request, including information maintained for the Agency by an entity under Government contract for records management purposes. It does not include records that are not already in existence and that would have to be created specifically to respond to a request. Information available in electronic form shall be searched and compiled in response to a request unless such search and compilation would significantly interfere with the operation of the Agency's automated information systems.

§ 212.3 Records available on the Agency's Web site.

Information that is required to be published in the FEDERAL REGISTER under 5 U.S.C. 552(a)(1) is regularly updated by the Agency and found on its public Web site: *www.usaid.gov/foia-requests*. Records that are required by the FOIA to be made available for public inspection and copying under 5 U.S.C. 552(a)(2) also are available on the Agency's public Web site.

Subpart B - Proactive Disclosures of Agency Records

§ 212.4 Materials available for public inspection and copying.

(a) In accordance with this subpart, the Agency shall make the following materials available for public inspection and copying:

(1) Operational policy in USAID's Automated Directives System (ADS) which have been adopted by the Agency and are not published in the FEDERAL REGISTER;

(2) Administrative staff manuals and instructions to staff that affect any member of the public; and

(3) Copies of all records, regardless of form or format, which have been released pursuant to a FOIA request, and which have been requested three (3) or more times, or because of the nature of their subject matter, have become or are likely to become the subject of subsequent requests for substantially the same records. The Agency shall decide on a case by case basis whether records fall into this category, based on the following factors:

- (i) Previous experience with similar records;
- (ii) The particular characteristics of the records involved, including their nature and the type of information contained in them; and
- (iii) The identity and number of requesters and whether there is widespread media, historical, academic, or commercial interest in the records.

Subpart C - Requirements for Making Requests

§ 212.5 How to make a request for records.

(a) *General information.* USAID has a centralized system for responding to FOIA requests. The Bureau for Management, Office of Management Services, Information and Records Division (M/MS/IRD) is the central processing point for requests for USAID records contained in Washington, D.C. and its overseas missions. All FOIA requests must be submitted to this office. To make a request for the Agency's records, a requester may send request via one of the following mediums:

- (1) By Email: foia@usaid.gov. Please include your mailing address, email address and phone number with your request. While our FOIA Specialists are happy to answer questions about the FOIA Program and/or help you formulate your request over the phone, please be advised that FOIA requests cannot accept by phone.

- (2) Online Portal: To submit your request online, please click the subsequent link:

<https://foiarequest.usaid.gov/index.aspx>

- (3) By US Postal Mail:

United States Agency of International Development

Bureau for Management, Office of Management Services

Services, Information and Records Division

1300 Pennsylvania Avenue, N.W.

Washington, D.C. 20523-2701

Room 2.7C RRB

(202) 712-0960

- (4) By Fax: (202) 216-3070

(b) *Third party requests.* Where a request for records pertains to a third party, a requester may receive greater access by submitting either a notarized authorization signed by that individual or a declaration made in compliance with the requirements set forth in the FOIA by that individual authorizing disclosure of the records to the requester, or by submitting proof that the individual is deceased (e.g., a copy of a death certificate or an obituary). As an exercise of administrative discretion, the agency can require a requester to supply additional information if necessary in order to verify that a particular individual has consented to disclosure.

(c) *Description of records sought.* Requesters must describe the records sought in sufficient detail to enable the Agency's personnel to locate them with a reasonable amount of effort. To the extent possible, requesters should include specific information that may assist in identifying the

requested records, such as the date, title or name, author, recipient, subject matter of the record, case number, file designation, or reference number. In general, requesters should include as much detail as possible about the specific records or the types of records that they are seeking. Before submitting their requests, requesters may contact the Agency's FOIA contact or FOIA Public Liaison to discuss the records they are seeking and to receive assistance in describing the records. If, after receiving a request and the Agency determines that it does not reasonably describe the records sought, the Agency shall inform the requester what additional information is needed or why the request is otherwise insufficient. Requesters who are attempting to reformulate or modify such a request may discuss their request with the Agency's designated FOIA Specialist or its FOIA Public Liaison, each of whom is available to assist the requester in reasonably describing the records sought. If a request does not reasonably describe the records sought, the Agency's response to the request may be delayed or denied.

Subpart D - Responsibility for Responding to Requests

§ 212.6 Designation of authorized officials.

(a) The Assistant Administrator for the Bureau for Management (M) serves as the USAID Chief FOIA Officer. The Chief FOIA Officer has overall responsibility for USAID compliance with the FOIA. The Chief FOIA Officer provides high level oversight and support to USAID's FOIA programs, and recommends adjustments to agency practices, personnel, and funding as may be necessary to improve FOIA administration, including through an annual Chief FOIA Officers Report submitted to the U.S. Department of Justice. The Chief FOIA Officer is responsible for offering training to agency staff

regarding their FOIA responsibilities; serves as the primary liaison with the Office of Government Information Services and the Office of Information Policy; and reviews, not less frequently than annually, all aspects of the Agency's administration of the FOIA to ensure compliance with the FOIA's requirements.

(b) The Bureau for Management, Office of Management Services, Information Records Division (M/MS/IRD) is the centralized FOIA office that receives, tracks, and processes all of USAID's FOIA requests to ensure transparency within the Agency.

(c) The Director, Bureau for Management, Office of Management Services (M/MS/OD) serves as the USAID FOIA Appeals Officer. The FOIA Appeals Officer is responsible for receiving and acting upon appeals from requesters whose initial FOIA requests for USAID records have been denied, in whole or in part.

(d) The Chief, Bureau for Management, Office of Management Services, Information and Records Division (M/MS/IRD) serves as USAID's FOIA Officer and FOIA Public Liaison. The FOIA Officer is responsible for program direction, original denials, and policy decisions required for effective implementation of USAID's FOIA program. The FOIA Public Liaison serves as a supervisory official to whom a FOIA requester can raise concerns about the services received, following an initial response from the FOIA staff. In addition, the FOIA Public Liaison assists, as appropriate, in reducing delays, increasing transparency and understanding of the status of requests, and resolving disputes.

(e) The FOIA Team Leader is the Principal Operations Officer within USAID for the processing of FOIA requests and release determinations.

(f) The FOIA Specialist also known as the Government Information Specialist (GIS) is responsible for processing requests and preparing records for release when such releases are authorized by the FOIA. They do not have the authority to make denials, including “no records” responses.

(g) The General Counsel (GC), FOIA Backstop Attorney Advisor has responsibility for providing legal advice on all USAID matters regarding or resulting from the FOIA. Upon request, GC advises M/MS/IRD on release and denial decisions, and apprises the FOIA Office of all significant developments with respect to the FOIA.

(h) Each Attorney Advisor designated to provide legal advice to USAID Bureaus/Independent Offices (B/IOs) is responsible for providing, at M/MS/IRD's request, legal advice on FOIA requests assigned to those B/IOs.

(i) The designated FOIA Liaison Officer (FLO) in each USAID Bureau and Office is responsible for tasking and facilitating the collection of responsive records and monitoring the production of records to M/MS/IRD.

§ 212.7 Processing of request.

(a) *In general.* In determining which records are responsive to a request, the Agency ordinarily will include only records in its possession as of the date that it begins its search. If any other date is used, the Agency shall inform the requester of that date.

(b) *Authority to grant or deny requests.* The FOIA Officer is authorized to grant or to deny any requests for records that are maintained by the Agency.

(c) *Consultation, referral, and coordination.* When reviewing records located by the Agency in response to a request, USAID shall determine whether another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under the FOIA and, if so, whether it should be released as a matter of discretion. As to any such record, USAID shall proceed in one of the following ways:

(1) *Consultation.* When records originated with USAID, but contain within them information of interest to another agency, or other Federal Government office, USAID should consult with that other agency prior to making a release determination.

(2) *Referral.* (i) When USAID believes that a different agency, or other Federal Government office is best able to determine whether to disclose the record, USAID should refer the responsibility for responding to the request regarding that record, as long as the referral is to an agency that is subject to the FOIA. Ordinarily, the agency that originated the record will be presumed to be best able to make the disclosure determination. However, if USAID and the originating agency jointly agree that the former is in the best position to respond regarding the record, then the record may be handled as a consultation.

(ii) Whenever USAID refers any part of the responsibility for responding to a request to another agency, it shall document the referral, maintain a copy of the record that it refers,

and notify the requester of the referral and inform the requester of the name(s) of the agency to which the record was referred, including that agency's FOIA contact information.

(e) *Furnishing records.* USAID shall furnish copies only of records that the Agency has in its possession. The Agency is not compelled to create new records. The Agency is not required to perform research for a requester. The Agency is required to furnish only one copy of a record. If information exists in different forms, the Agency will provide the record in the form that best conserves government resources. Requests may specify the preferred form or format (including electronic formats) for the records sought by the requester. USAID will accommodate the form or format request if the record is readily reproducible in that form or format.

(f) *Archival records.* The Agency ordinarily transfers records in accordance with its retirement authority, included in ADS 502, to the National Archives. These records become the physical and legal custody of the National Archives. Accordingly, requests for retired Agency records should be submitted to the National Archives by mail addressed to Special Access and FOIA Staff (NWCTF), 8601 Adelphi Road, Room 5500, College Park, MD 20740; by fax to (301) 837-1864; or by email to specialaccess_foia@nara.gov.

(g) *Records previously released.* If USAID has released a record, or a part of a record, to a requester in the past, the Agency will ordinarily release it to a new requester. However, the Agency will not release it to the new requester if a statute forbids this disclosure, or if an exemption applies that did not apply earlier, or was applied differently in the previous situations.

(h) *Unauthorized disclosure.* The principle stated in paragraph (f) of this section, does not apply if the previous release was unauthorized.

(i) *Poor copy.* If USAID cannot make a legible copy of a record to be released, the Agency is not required to reconstruct it. Instead, the Agency will furnish the best copy possible and note its poor quality in the Agency's reply.

Subpart E - Reasons for Withholding Some Records

§ 212.8 General policy.

(a) Section 552(b) of the Freedom of Information Act contains nine exemptions to the mandatory disclosure of records. Information obtained by the Agency from any individual or organization, furnished in reliance on a provision for confidentiality authorized by applicable statute or regulation, will not be disclosed, to the extent it can be withheld under one of these exemptions. This section does not itself authorize the giving of any pledge of confidentiality by any officer or employee of the Agency.

(b) USAID shall:

- (1) Withhold information under the FOIA only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption or disclosure is prohibited by law.

(2) Consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible.

(3) Take reasonable steps necessary to segregate and release nonexempt information.

§ 212.9 Exemption 1: national defense and foreign policy.

Exemption 1 of the FOIA permits the withholding of matters specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and which are in fact properly classified under such Executive Order.

§ 212.10 Exemption 2: internal personnel rules and practices.

Exemption 2 of the FOIA covers matters related solely to USAID's internal personnel rules and practices of the Agency.

§ 212.11 Exemption 3: records exempted by other statutes.

(a) Exemption 3 of the FOIA incorporates the various nondisclosure provisions that are contained in other federal statutes. Exemption 3 allows the withholding of information prohibited from disclosure by another statute only if one of two disjunctive requirements are met. The statute either:

(1) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or

(2) Establishes particular criteria for withholding or refers to particular types of matters to be withheld.

(b) A statute thus falls within Exemption 3 coverage if it satisfies any one of its disjunctive requirements.

§ 212.12 Exemption 4: trade secrets and confidential commercial or financial information.

Exemption 4 of the FOIA protects trade secrets and commercial or financial information obtain for a person [that is] privilege or confidential.

(a) A trade secret has been narrowly defined by the courts under the FOIA as a commercially valuable plan, formula, process, or device that is used for making, preparing, compounding or processing trade commodities and that can be said to be the end product of either innovation or substantial effort.

(b) Confidential commercial or financial information is information that relates to business or trade that has been obtained from a person (other than a federal employee), and has not been shared or made available to the public.

§ 212.13 Exemption 5: internal memoranda.

Exemption 5 of the FOIA applies to inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the Agency. This includes internal advice, recommendations, and subjective evaluations, as opposed to factual matters contained in records that pertain to the decision-making process of an agency, whether

within or among agencies. The three primary privileges incorporated in Exemption 5 are the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege.

(a) *The deliberative process privilege* allows the Agency to withhold documents which reflect deliberative, pre-decisional communications. This privilege protects the integrity of agencies' decision-making processes. There are two requirements that must be met to withhold under the deliberative process privilege: Information must be pre-decisional and deliberative. The Agency has an obligation to segregate out and release factual portions. The deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested.

(b) *The attorney work-product privilege* only applies when the document was created by or at the direction of an attorney; and created in reasonable anticipation of litigation. This privilege covers both factual and deliberative materials, therefore, the Agency is not required to segregate out and release factual portions of attorney work-product documents.

(c) *The attorney-client privilege* protects confidential communications between an attorney and his/her client relating to a legal matter for which the client has sought professional advice. This privilege is not limited to litigation and includes protection for facts provided by the client as well as the attorney's opinions. This privilege covers both factual and deliberative materials.

§ 212.14 Exemption 6: clearly unwarranted invasion of personal privacy.

Exemption 6 of the FOIA applies to personnel, medical, and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. This exemption protects the privacy interests of individuals by allowing USAID to withhold personal data kept in its files where there is an expectation of privacy. Once it has been determined that a personal privacy interest is threatened by a requested disclosure, the exemption requires agencies to strike a balance between an individual's privacy interest and the public's interest in disclosure.

§ 212.15 Exemption 7: law enforcement.

Exemption 7 of the FOIA allows agencies to withhold records or information compiled for law enforcement purposes, but only to the extent that the production of such records would cause one of the following harms of Exemption 7 described below:

- (a) Exemption (7)(A) allows the withholding of a law enforcement record that could reasonably be expected to interfere with enforcement proceedings.
- (b) Exemption (7)(B) allows the withholding of law enforcement information that would deprive a person of a right to a fair trial or an impartial adjudication.
- (c) Exemption (7)(C) recognizes that individuals have a privacy interest in information maintained in law enforcement files. If the disclosure of information could reasonably be expected to constitute an unwarranted invasion of personal privacy, the information may be exempt from disclosure.

(d) Exemption (7)(D) protects the identity of confidential sources. Information that could reasonably be expected to reveal the identity of a confidential source is exempt. A confidential source can include a state, local, or foreign agency or authority, or a private institution that furnished information on a confidential basis. In addition, the exemption protects information furnished by a confidential source if the data was compiled by a criminal law enforcement authority during a criminal investigation.

(e) Exemption (7)(E) protects from disclosure information that would reveal techniques and procedures for law enforcement investigations or prosecutions or that would disclose guidelines for law enforcement investigations or prosecutions if disclosure of the information could reasonably be expected to risk circumvention of the law.

(f) Exemption (7)(F) protects law enforcement information that could reasonably be expected to endanger the life or physical safety of any individual.

§ 212.16 Exemption 8: records on financial institutions.

Exemption 8 of the FOIA protects information that is contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions (such as Federal Deposit Insurance Corporation (FDIC), the Federal Reserve, or similar agencies).

§ 212.17 Exemption 9: records concerning geological information.

Exemption 9 of the FOIA covers geological and geophysical information and data, including maps, concerning wells.

§ 212.18 Exclusions one through three.

(a) The FOIA contains three special protection provisions that expressly authorize federal law enforcement agencies, for especially sensitive records under certain specified circumstances, to treat the records as not subject to the FOIA. USAID may not be required to confirm the existence of these categories of records. If these records are requested, USAID may respond that there are no records responsive to the request. However, these exclusions do not broaden the authority of the USAID to withhold documents from the public. The exclusions are only applicable to information that is otherwise exempt from disclosure.

(1) *Exclusion 1.* (i) The first exclusion may be used when a request seeks information described in the FOIA, subsection (b)(7)(A), and meets the following requirements:

(A) The investigation in question must involve a possible violation of criminal law.

(B) There must be reason to believe that the subject of the investigation is not already aware that the investigation is underway.

(C) Disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings.

(ii) USAID may respond to a FOIA request for investigatory records as if the records are not subject to the requirements of the FOIA when all of these conditions exist. In other words, the USAID response does not have to reveal that it is conducting an investigation.

(2) *Exclusion 2.* Informant records maintained by USAID criminal law enforcement filed under the informant's name or personal identifier are covered by Exclusion 2. USAID is not required to confirm the existence of these records unless the informant's status has been officially confirmed. This exclusion helps agencies to protect the identity of confidential informants.

(3) *Exclusion 3.* The third exclusion only applies to records maintained by the Federal Bureau of Investigation, which pertain to foreign intelligence, counterintelligence, or international terrorism. When the existence of these types of records is classified, the FBI may treat the records as not subject to the requirements of FOIA.

(b) Requesters who believe that records were improperly withheld because of the exclusions can seek judicial review by filing suit in Federal District Court.

Subpart F - Timing of Responses to Requests

212.19 Time limits.

(a) *In general.* The Agency ordinarily will respond to requests according to their order of receipt. In instances involving misdirected requests that are re-routed, the response time will

commence on the date that the request is received by the FOIA office that is designated to receive requests.

(b) *Multitrack processing.* (1) When the Agency has a significant number of requests, the nature of which precludes a determination within 20 working days, the requests may be processed in a multitrack processing system, based on the date of receipt, the amount of work and time involved in processing the request, and whether the request qualifies for expedited processing.

(2) The Agency may establish as many processing tracks as appropriate; processing within each track shall ordinarily be based on a “first-in, first-out” concept, and rank-ordered by the date of receipt of the request.

(3) The Agency may provide a requester whose request does not qualify for the fastest track an opportunity to limit the scope of the request in order to qualify for a faster track. This multitrack processing system does not lessen agency responsibility to exercise due diligence in processing requests in the most expeditious manner possible.

(4) The Agency shall process requests in each track on a “first-in, first-out” basis, unless there are unusual circumstances as set forth in paragraph (c) of this section, or the requester is entitled to expedited processing as set forth paragraph (e) of this section.

(c) *Unusual circumstances.* Whenever the statutory time limit for processing a request cannot be met because of “unusual circumstances,” as defined in the FOIA, and the Agency extends the time limit on that basis, the Agency shall, before expiration of the 20-day period to respond, notify the requester in writing of the unusual circumstances involved and of the date by which processing of the request can be expected to be completed. Where the extension exceeds 10 working days, the Agency shall, in the written notice, notify the requester of right to seek

dispute resolution services from the Office of Government Information Services (OGIS). In addition, the Agency shall, as described by the FOIA, provide the requester with an opportunity to modify the request or arrange an alternative time period for processing.

(d) *Aggregating requests.* For the purposes of satisfying unusual circumstances under the FOIA, the Agency may aggregate requests in cases where it reasonably appears that multiple requests, submitted either by a requester or by a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances. The Agency shall not aggregate multiple requests that involve unrelated matters.

(e) *Expedited processing.* (1) Requests and appeals shall be processed on an expedited basis whenever it is determined that they involve:

(i) Circumstances in which the lack of expedited processing could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(ii) An urgency to inform the public about an actual or alleged Federal Government activity, if made by a person who is primarily engaged in disseminating information;

(iii) The loss of substantial due process rights; or

(iv) A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence.

(2) A requester who seeks expedited processing must submit a statement, certified to be true and correct, explaining in detail the basis for making the request for expedited processing. For example, under paragraph (e)(1)(ii) of this section, a requester who is not a full-time member of the news media must establish that the requester is a person whose primary professional activity or occupation is information dissemination, though it need not be the requester's sole occupation. Such a requester also must establish a particular urgency to inform the public about

the government activity involved in the request—one that extends beyond the public's right to know about government activity generally. The existence of numerous articles published on a given subject can be helpful in establishing the requirement that there be an “urgency to inform” the public on the topic. As a matter of administrative discretion, the Agency may waive the formal certification requirement.

(3) The Agency shall notify the requester within 10 calendar days of the receipt of a request for expedited processing of its decision whether to grant or deny expedited processing. If expedited processing is granted, the request shall be given priority, placed in the processing track for expedited requests, and shall be processed as soon as practicable. If a request for expedited processing is denied, any appeal of that decision shall be acted on expeditiously.

Subpart G – Responses to Requests

§ 212.20 Responsibility for responding to requests.

(a) *In general.* USAID should, to the extent practicable, communicate with requesters having access to the Internet using electronic means, such as email or web portal.

(b) *Acknowledgments of requests.* USAID shall acknowledge the request and assign it an individualized tracking number. The Agency shall include in the acknowledgment a brief description of the records sought to allow requesters to more easily keep track of their requests.

(c) *Grants of requests.* Once the Agency makes a determination to grant a request in full or in part, it shall notify the requester in writing. The Agency also shall inform the requester of any fees charged and shall disclose the requested records to the requester promptly upon payment of any applicable fees.

(d) *Adverse determinations of requests.* If the Agency has made an adverse determination denying a request in any respect, the Agency shall notify the requester of that determination in

writing. Adverse determinations, or denials of requests, include decisions that: the requested record is exempt, in whole or in part; the request does not reasonably describe the records sought; the information requested is not a record subject to the FOIA; the requested record does not exist, cannot be located, or has been destroyed; or the requested record is not readily reproducible in the form or format sought by the requester. Adverse determinations also include denials involving fees or fee waiver matters or denials of requests for expedited processing.

(e) *Information furnished.* All denials are in writing and describe in general terms the material withheld; state the reasons for the denial, including, as applicable, a reference to the specific exemption of the FOIA authorizing the withholding; explain your right to appeal the decision and identify the official to whom you should send the appeal; and are signed by the person who made the decision to deny all or part of the request.

(f) *Conducting searches.* USAID performs a diligent search for records to satisfy your request. Nevertheless, the Agency may not be able to find the records requested using the information provided, or the records may not exist. If the Agency advises the requester that the Agency has been unable to find the records despite a diligent search, this does not constitute a denial of the request and preserves the right to appeal.

Subpart H - Confidential Commercial Information

§ 212.21 Policy and procedure.

(a) *Definitions.* (1) *Confidential commercial information* means commercial or financial information obtained by the Agency from a submitter that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

(2) *Business submitter* means any person or entity, including a corporation, State, or foreign government, but not including another Federal Government entity, that provides information, either directly or indirectly to the Federal Government.

(b) *Designation of confidential commercial information.* A submitter of confidential commercial information must use good faith efforts to designate by appropriate markings, either at the time of submission or within a reasonable time thereafter, any portion of its submission that it considers to be protected from disclosure under Exemption 4. These designations shall expire 10 years after the date of the submission unless the submitter requests and provides justification for a longer designation period.

(c) *When notice to business submitters is required.* (1) The Agency shall promptly provide written notice to a business submitter of confidential commercial information whenever records containing such information are requested under the FOIA if, after reviewing the request, the responsive records, and any appeal by the requester, the Agency determines that it may be required to disclose the records, provided:

(i) The requested information has been designated in good faith by the business submitter as information considered protected from disclosure under Exemption 4; or

(ii) The Agency has a reason to believe that the requested information may be protected from disclosure under Exemption 4, but has not yet determined whether the information is protected from disclosure under that exemption or any other applicable exemption.

(2) The notice shall either describe the commercial information requested or include a copy of the requested records or portions of records containing the information. In cases involving a voluminous number of submitters, notice may be made by posting or publishing the notice in a place or manner reasonably likely to accomplish it.

(d) *Exceptions to business submitter notice requirements.* The notice requirements of this section shall not apply if:

(1) The Agency determines that the information is exempt under the FOIA;

(2) The information has been lawfully published or has been officially made available to the public;

(3) Disclosure of the information is required by a statute other than the FOIA or by a regulation issued in accordance with the requirements of Executive Order 12600 of June 23, 1987; or

(4) The designation made by the business submitter appears obviously frivolous, except that, in such a case, the Agency shall give the business submitter written notice of any final decision to disclose the information and must provide that notice within a reasonable number of days prior to a specified disclosure date.

(e) *Opportunity to object to disclosure.* (1) The Agency shall specify a reasonable time period within which the business submitter must respond to the notice referenced above. If a business submitter has any objections to disclosure, the business submitter should:

(i) Provide the Agency with a detailed written statement that specifies all grounds for withholding the particular information under any exemption of the FOIA. In order to rely on Exemption 4 as basis for nondisclosure, the business submitter must explain why the information constitutes a trade secret or commercial or financial information that is privileged or confidential.

(ii) Designate by appropriate markings, either at the time a record is submitted to the Agency or within a reasonable period time thereafter, those portions of the record which it deems to contain confidential commercial information. The designation shall be accompanied by a certification made by the business submitter, its agent or designee that to the best of the business

submitter's knowledge, information and belief, the record does, in fact, contain confidential commercial information that has not previously been disclosed to the public.

(2) A business submitter who fails to respond within the time period specified in the notice shall be considered to have no objection to disclosure of the information. Information received by the Agency after the date of any disclosure decision shall not be considered by the Agency. Any information provided by a business submitter under this subpart may itself be subject to disclosure under the FOIA.

(f) *Analysis of objections.* The Agency shall consider a business submitter's objections and specific grounds for nondisclosure in deciding whether to disclose the requested information.

(g) *Notice of intent to disclose.* Whenever the Agency decides to disclose information over the objection of a business submitter, the Agency shall provide the business submitter written notice, which shall include:

(1) A statement of the reasons why each of the business submitter's disclosure objections was not sustained;

(2) A description of the information to be disclosed; and

(3) A specified disclosure date, which shall be a reasonable time subsequent to the notice.

(h) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of confidential commercial information, the Agency shall promptly notify the business submitter.

Subpart I - Administrative Appeals

§ 212.22 Appeal procedures.

USAID must inform the requester of the reasons for the denial and the requester's right to appeal the denial to the FOIA Appeals Officer whenever a FOIA request is denied.

(a) *What a requester can appeal.* A requester may appeal the withholding of a document or denial of a fee waiver request. A requester may contest the type or amount of fees that were charged, or may appeal any other type of adverse determination under the FOIA. A requester may also appeal because USAID failed to conduct an adequate search for the documents requested. However, a requester may not file an administrative appeal for the lack of a timely response. A requester may administratively appeal any portion denied when their request is granted in part and denied in part. An appeal does not affect the release of the documents that may be disclosed if the Agency has agreed to disclose some but not all requested documents.

(b) *Requirements for making an appeal.* A requester may appeal any adverse determinations to USAID. The requester must make the appeal in writing. To be considered timely, the appeal must be postmarked, or in the case of electronic submissions, transmitted, within 90 calendar days after the date of the response. The appeal should clearly identify the Agency's determination that is being appealed and the assigned request number. To facilitate handling, the requester should mark both the appeal letter and envelope, or subject line of the electronic transmission, "Freedom of Information Act Appeal."

(c) *Adjudication of appeals.* (1) The Director of the Bureau for Management Services or designee will conduct de novo review and make the final determination on the appeals.

(2) An appeal ordinarily will not be adjudicated if the request becomes a matter of FOIA litigation.

(d)) *Decisions on appeals.* A decision on an appeal must be made in writing. A decision that upholds the Agency's determination will contain a statement that identifies the reasons for the affirmance, including any FOIA exemptions applied. The decision will provide the requester with notification of the statutory right to file a lawsuit and will inform the requester of the mediation services offered by the Office of Government Information Services of the National Archives and Records Administration as a non-exclusive alternative to litigation. If the Agency's decision is remanded or modified on appeal, the requester will be notified of that determination in writing. The Agency will thereafter further process the request in accordance with that appeal determination and respond directly to the requester.

(e) *When appeal is required.* Before seeking review by a court of the Agency's adverse determination, a requester generally must first submit a timely administrative appeal.

(f) *Where to file an appeal.* An appeal may be filed by sending a letter to: FOIA Appeals Officer, Bureau for Management Director, Office of Management Services, U.S. Agency for International Development Room 2.12-010, RRB, Washington, DC 20523-4601. There is no charge for filing an administrative appeal.

§ 212.23 Mediation and dispute services.

The Office of Government Information Services of the National Archives and Records Administration (OGIS) is a Freedom of Information Act (FOIA) resource for the public and the government. Congress has charged OGIS with reviewing FOIA policies, procedures and compliance of Federal agencies and to recommend changes to the FOIA. OGIS' mission also includes resolving FOIA disputes between Federal agencies and requesters. In the Administrative appeal process, OGIS works as a non-exclusive alternative to litigation.

When USAID makes a determination on a request, the Agency shall offer the services of the FOIA Public Liaison, and will notify requesters of the mediation services provided by OGIS.

Specifically, USAID will include in the Agency's notification to the requester;

(a) The right of the requester to seek assistance from the FOIA Public Liaison of the Agency, and in the case of an adverse determination;

(b) The right of the requester to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services.

Subpart J - Preservation of Records

§ 212.24 Policy and procedures.

The Agency shall preserve all correspondence relating to the requests it receives under this subpart, and all records processed pursuant to such requests, until such time as the destruction of such correspondence and records is authorized pursuant to Title 44 of the United States Code, and appropriate records disposition authority granted by NARA. Under no circumstances shall records be sent to a Federal Records Center, transferred to the permanent custody of NARA, or destroyed while they are the subject of a pending request, appeal, or civil action under the FOIA.

Subpart K - Fees

§ 212.25 Fees to be charged - general

(a) *In general.* USAID shall charge for processing requests under the FOIA in accordance with the provisions of this section and with the Office of Management and Budget (OMB) Guidelines. In order to resolve any fee issues that arise under this section, the Agency may contact a requester for additional information. The Agency shall ensure that search, review, and

duplication are conducted in the most efficient and the least expensive manner. USAID ordinarily will collect all applicable fees before sending copies of records to a requester. Requesters must pay fees by check or money order made payable to the Treasury of the United States.

(b) *Definitions.* For purposes of this section:

(1) *Commercial use request* is a request that asks for information for a use or a purpose that furthers a commercial, trade, or profit interest, which can include furthering those interests through litigation. The Agency's decision to place a requester in the commercial use category will be made on a case-by-case basis based on the requester's intended use of the information.

(2) *Direct costs* are those expenses that the Agency incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records in order to respond to a FOIA request. Direct costs do not include overhead expenses such as the costs of space, and of heating or lighting a facility.

(3) *Duplication* is reproducing a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, audiovisual materials, or electronic records, among others.

(4) *Educational institution* is any school that operates a program of scholarly research. A requester in this fee category must show that the request is authorized by, and is made under the auspices of, an educational institution and that the records are not sought for a commercial use, but rather are sought to further scholarly research. To fall within this fee category, the request must serve the scholarly research goals of the institution rather than an individual research goal.

(5) *Noncommercial scientific institution* is an institution that is not operated on a “commercial” basis, as defined in paragraph (b)(1) of this section and that is operated solely for

the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. A requester in this category must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further scientific research and are not for a commercial use.

(6) *Representative of the news media* is any person or entity organized and operated to publish or broadcast news to the public that actively gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term “news” means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations that broadcast “news” to the public at large and publishers of periodicals that disseminate “news” and make their products available through a variety of means to the general public, including news organizations that disseminate solely on the Internet. A request for records supporting the news-dissemination function of the requester shall not be considered to be for a commercial use. “Freelance” journalists who demonstrate a solid basis for expecting publication through a news media entity shall be considered as a representative of the news media. A publishing contract would provide the clearest evidence that publication is expected; however, components shall also consider a requester's past publication record in making this determination.

(7) *Review* is the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. Review time includes processing any record for disclosure, such as doing all that is necessary to prepare the record for disclosure, including the process of redacting the record and marking the appropriate exemptions. Review costs are properly charged even if a record ultimately is not disclosed. Review time also includes

time spent both obtaining and considering any formal objection to disclosure made by a confidential commercial information submitter, but it does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(8) *Search* is the process of looking for and retrieving records or information responsive to a request. Search time includes page-by-page or line-by-line identification of information within records and the reasonable efforts expended to locate and retrieve information from electronic records.

(c) *Charging fees.* In responding to FOIA requests, the Agency shall charge the following fees unless a waiver or reduction of fees has been granted under paragraph (k) of this section.

(1) *Search.* (i) Requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media are not subject to search fees. Search fees shall be charged for all other requesters, subject to the restrictions of paragraph (d) of this section. The Agency may properly charge for time spent searching even if they do not locate any responsive records or if they determine that the records are entirely exempt from disclosure.

(2) *Duplication.* Duplication fees shall be charged to all requesters, subject to the restrictions of paragraph (d) of this section. The Agency shall honor a requester's preference for receiving a record in a particular form or format where it is readily reproducible by the agency in the form or format requested. Where photocopies are supplied, the Agency shall provide one copy per request at a cost of twenty cents per page. For copies of records produced on tapes, disks, or other media, the direct costs of producing the copy, including operator time shall be charged. Where paper documents must be scanned in order to comply with a requester's preference to receive the records in an electronic format, the requester shall pay the direct costs

associated with scanning those materials. For other forms of duplication, the Agency shall charge the direct costs.

(3) *Review.* Review fees shall be charged to requesters who make commercial use requests. Review fees shall be assessed in connection with the initial review of the record, *i.e.*, the review conducted by the agency to determine whether an exemption applies to a particular record or portion of a record. No charge will be made for review at the administrative appeal stage of exemptions applied at the initial review stage. However, if a particular exemption is deemed to no longer apply, any costs associated with the Agency re-review of the records in order to consider the use of other exemptions may be assessed as review fees.

(d) *Restrictions on charging fees.* (1) No search fees will be charged for requests by educational institutions (unless the records are sought for a commercial use), noncommercial scientific institutions, or representatives of the news media.

(2) When the Agency determines that unusual circumstances apply to the processing of a request, and the Agency has provided timely written notice to the requester, the delay is excused for an additional 10 days. If the Agency fails to comply with the extended time limit, it may not charge search fees (or for requesters with preferred fee status, may not charge duplication fees).

(i) *Exception:* If unusual circumstances apply and “more than 5000 pages are necessary to respond to the request,” the Agency may charge search fees (or, for requesters in preferred fee status, may charge duplication fees) if timely written notice has been made to the requester and the Agency has discussed with the requester via written mail, electronic mail, or telephone (or made not less than 3 good-faith attempts to do so) how the requester could effectively limit the scope of the request.

(ii) *Court Determination that exceptional circumstances exist:* If a court determines that exceptional circumstances exist, the Agency's failure to comply with a time limit shall be excused for the length of time provided by the court order.

(3) If the Agency fails to comply with the time limits in which to respond to a request, and if no unusual or exceptional circumstances, as those terms are defined by the FOIA, apply to the processing of the request, it may not charge search fees, or, in the instances of requests from requesters described in paragraph (d)(1) of this section, may not charge duplication fees.

(4) No search or review fees will be charged for a quarter-hour period unless more than half of that period is required for search or review.

(5) Except for requesters seeking records for a commercial use, the Agency shall provide without charge:

- (i) The first 100 pages of duplication (or the cost equivalent for other media); and
- (ii) The first two hours of search.

(6) When, after first deducting the 100 free pages (or its cost equivalent) and the first two hours of search, a total fee calculated under paragraph (c) of this section is \$25.00 or less for any request, no fee will be charged.

(e) *Notice of anticipated fees in excess of \$25.00.* (1) When the Agency determines or estimates that the fees to be assessed in accordance with this section will exceed \$25.00, the Agency shall notify the requester of the actual or estimated amount of the fees, including a breakdown of the fees for search, review or duplication, unless the requester has indicated a willingness to pay fees as high as those anticipated. If only a portion of the fee can be estimated readily, the agency shall advise the requester accordingly. If the requester is a noncommercial use requester, the notice shall specify that the requester is entitled to the statutory entitlements of

100 pages of duplication at no charge and, if the requester is charged search fees, two hours of search time at no charge, and shall advise the requester whether those entitlements have been provided.

(2) In cases in which a requester has been notified that the actual or estimated fees are in excess of \$25.00, the request shall not be considered received and further work will not be completed until the requester commits in writing to pay the actual or estimated total fee, or designates some amount of fees the requester is willing to pay, or in the case of a noncommercial use requester who has not yet been provided with the requester's statutory entitlements, designates that the requester seeks only that which can be provided by the statutory entitlements. The requester must provide the commitment or designation in writing, and must, when applicable, designate an exact dollar amount the requester is willing to pay. The Agency is not required to accept payments in installments.

(3) If the requester has indicated a willingness to pay some designated amount of fees, but the Agency estimates that the total fee will exceed that amount, the Agency shall toll the processing of the request when it notifies the requester of the estimated fees in excess of the amount the requester has indicated a willingness to pay. The Agency shall inquire whether the requester wishes to revise the amount of fees the requester is willing to pay or modify the request. Once the requester responds, the time to respond will resume from where it was at the date of the notification.

(4) The Agency shall make available their FOIA Public Liaison or other FOIA Specialists to assist any requester in reformulating a request to meet the requester's needs at a lower cost.

(f) *Charges for other services.* Although not required to provide special services, if the Agency chooses to do so as a matter of administrative discretion, the direct costs of providing the

service shall be charged. Examples of such services include certifying that records are true copies, providing multiple copies of the same document, or sending records by means other than first class mail.

(g) *Charging interest.* The Agency may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges shall be assessed at the rate provided in 31 U.S.C. 3717 and will accrue from the billing date until payment is received by the agency. The Agency shall follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97-365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(h) *Aggregating requests.* When the Agency reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a single request into a series of requests for the purpose of avoiding fees, the Agency may aggregate those requests and charge accordingly. The Agency may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. For requests separated by a longer period, the Agency will aggregate them only where there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involved. Multiple requests involving unrelated matters shall not be aggregated.

(i) *Advance payments.* (1) For requests other than those described in paragraphs (i)(2) or (i)(3) of this section, the agency shall not require the requester to make an advance payment before work is commenced or continued on a request. Payment owed for work already completed (*i.e.*, payment before copies are sent to a requester) is not an advance payment.

(2) When the Agency determines or estimates that a total fee to be charged under this section will exceed \$250.00, it may require that the requester make an advance payment up to the

amount of the entire anticipated fee before beginning to process the request. The Agency may elect to process the request prior to collecting fees when it receives a satisfactory assurance of full payment from a requester with a history of prompt payment.

(3) Where a requester has previously failed to pay a properly charged FOIA fee to the agency within 30 calendar days of the billing date, the Agency may require that the requester pay the full amount due, plus any applicable interest on that prior request, and the Agency may require that the requester make an advance payment of the full amount of any anticipated fee before the Agency begins to process a new request or continues to process a pending request or any pending appeal. If the Agency has a reasonable basis to believe that a requester has misrepresented the requester's identity in order to avoid paying outstanding fees, it may require that the requester provide proof of identity.

(4) In cases in which the Agency requires advance payment, the request shall not be considered received and further work will not be completed until the required payment is received. If the requester does not pay the advance payment within 30 calendar days after the date of the Agency's fee determination, the request will be closed.

(j) *Other statutes specifically providing for fees.* The fee schedule of this section does not apply to fees charged under any statute that specifically requires an agency to set and collect fees for particular types of records. In instances where records responsive to a request are subject to a statutorily-based fee schedule program, the Agency shall inform the requester of the contact information for that program.

(k) *Requirements for waiver or reduction of fees.* (1) Records responsive to a request shall be furnished without charge or at a reduced rate below the rate established under paragraph (c) of

this section, where the Agency determines, based on all available information, that the requester has demonstrated that:

(i) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and

(ii) Disclosure of the information is not primarily in the commercial interest of the requester.

(2) In deciding whether disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of operations or activities of the government, the Agency shall consider all four of the following factors:

(i) The subject of the request must concern identifiable operations or activities of the Federal Government, with a connection that is direct and clear, not remote or attenuated.

(ii) Disclosure of the requested records must be meaningfully informative about government operations or activities in order to be “likely to contribute” to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not contribute to such understanding where nothing new would be added to the public's understanding.

(iii) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area as well as the requester's ability and intention to effectively convey information to the public shall be considered. It shall be presumed that a representative of the news media will satisfy this consideration.

(iv) The public's understanding of the subject in question must be enhanced by the disclosure to a significant extent. However, the Agency shall not make value judgments about whether the information at issue is “important” enough to be made public.

(3) To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, the Agency shall consider the following factors:

(i) The Agency shall identify any commercial interest of the requester, as defined in paragraph (b)(1) of this section, that would be furthered by the requested disclosure. Requesters shall be given an opportunity to provide explanatory information regarding this consideration.

(ii) A waiver or reduction of fees is justified where the public interest is greater than any identified commercial interest in disclosure. The Agency ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return shall not be presumed to primarily serve the public interest.

(4) Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver shall be granted for those records.

(5) Requests for a waiver or reduction of fees should be made when the request is first submitted to the Agency and should address the criteria referenced above. A requester may submit a fee waiver request at a later time so long as the underlying record request is pending or on administrative appeal. When a requester who has committed to pay fees subsequently asks for a waiver of those fees and that waiver is denied, the requester shall be required to pay any costs incurred up to the date the fee waiver request was received. A requester may appeal the denial of a fee waiver.

§ 212.26 Fees to be charged—requester categories.

(a) The following specific fees are charged for services rendered:

(1) Commercial Use:

Search: \$40.00 per hour

Search costs will be assessed even though no records may be found or even if, after review, there is no disclosure or records.

Review: \$55.00 per hour

Duplication: 20¢ per page

(2) Educational & Non-Commercial Scientific Institutions

Search: No fee

Review: No fee

Duplication: 20¢ per page after the first 100 pages

(3) Representatives of the News Media

Search: No fee

Review: No fee

Duplication: 20¢ per page after the first 100 pages

(4) All Others

Search: Same as "Commercial Users" except the first two hours shall be furnished without charge.

Review: No fee

Duplication: 20¢ per page after the first 100 pages

(b) If copies of records are provided in other than paper format (such as on microfiche, video tape, or as electronic data files), or other than first-class mail is requested or required, the requester is charged the actual cost of providing these additional services.

Subpart L – Annual Reporting Requirements

§ 212.27 Annual Report.

The FOIA requires each federal agency to submit an Annual Report to the Attorney General each year. The Annual Report contains detailed statistics on the numbers of requests received and processed by the Agency, the time taken to respond, and the outcome of each request, as well as many other vital statistics regarding the administration of the FOIA.

§ 212.28 Chief FOIA Officer's Report.

The Attorney General's 2009 FOIA Guidelines require the Chief FOIA Officer for each federal agency to submit a report to the Attorney General containing a detailed description of the steps taken by the Agency to improve FOIA compliance and transparency. These reports contain details of FOIA administration, as well as the steps taken to implement the Attorney General's 2009 FOIA Guidelines during each reporting year.

Subpart M – FOIA Definitions

§ 212.29 Glossary.

As used in this part:

Administrative FOIA Appeal is an independent review of the initial determination made in response to a FOIA request. Requesters who are dissatisfied with the response made on their initial request have a statutory right to appeal the initial determination made by the Agency.

Agency is any executive agency, military agency, government corporation, government controlled corporation, or other establishment in the executive branch of the Federal Government, or any independent regulatory agency. Thus, USAID is an agency.

Backlog is the number of requests or administrative appeals that are pending beyond the statutory time period for a response.

Complex request is a request that typically seeks a high volume of material or requires additional steps to process such as the need to search for records in multiple locations.

Consultation is when USAID locates a record that contains information of interest to another agency, and USAID asks for the views of that other agency on the disclosability of the records before any final determination is made.

Discretionary disclosure is information that the Agency releases even though it could have been withheld under one of the FOIA's exemptions. Agencies release information as a matter of discretion when there is no foreseeable harm in disclosure.

Duplication is reproducing a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, audiovisual materials, or electronic records, among others.

Electronic record is any information that is recorded in a form that only a computer can process and that satisfies the definition of a Federal record per the *Federal Records Act*. Federal electronic records are not necessarily kept in a "recordkeeping system" but may reside in a generic electronic information system or are produced by an application such as word processing or electronic mail.

Exemptions are nine categories of information that are not required to be released in response to a FOIA request because release would be harmful to a government or private interest. These categories are called "exemptions" from disclosures.

Expedited processing is the FOIA response track granted in certain limited situations, specifically when a FOIA request is processed ahead of other pending requests.

FOIA Library is an online page on the Agency's FOIA website, where certain categories of records are proactively disclosed. The FOIA Library contains both operational documents about the Agency as well as records that have been frequently requested under the FOIA.

Freedom of Information Act or FOIA is a United States federal law that grants the public access to information possessed by government agencies. Upon written request, U.S. government

agencies are required to release information unless it falls under one of nine exemptions listed in the Act.

Frequently requested records are records that have been requested three (3) or more times from the Agency.

Multi-track processing is a system that divides in-coming FOIA requests according to their complexity so that simple requests requiring relatively minimal review are placed in one processing track and more complex requests are placed in one or more other tracks. Requests granted expedited processing are placed in yet another track. Requests in each track are processed on a first in/first out basis.

Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and agencies as an alternative to litigation. OGIS also reviews agency FOIA compliance, policies, and procedures and makes recommendations for improvement. The Office is a part of the National Archives and Records Administration, and was created by Congress as part of the OPEN Government Act of 2007, which amended the FOIA.

Proactive disclosures are records made publicly available by agencies without waiting for a specific FOIA request. Agencies now post on their websites material concerning their functions and mission. The FOIA itself requires agencies to make available certain categories of information, including final opinions and orders, specific policy statements, certain administrative staff manuals and frequently requested records.

Record means information regardless of its physical form or characteristics including information created, stored, and retrievable by electronic means that is created or obtained by the Agency and under the control of the Agency at the time of the request, including information maintained for the Agency by an entity under Government contract for records management purposes. It does not include records that are not already in existence and that would have to be created specifically to respond to a request. Information available in electronic form shall be searched and compiled in response to a request unless such search and compilation would significantly interfere with the operation of the Agency's automated information systems.

Referral occurs when an agency locates a record that originated with, or is of otherwise primary interest to another agency. It will forward that record to the other agency to process the record and to provide the final determination directly to the requester.

Simple request is a FOIA request that an agency anticipates will involve a small volume of material or which will be able to be processed relatively quickly.

Subpart N - Other Rights and Services

§ 212.30 Rights and services qualified by the FOIA statute.

Nothing in this subpart shall be construed to entitle any person, as a right, to any service or to the disclosure of any record to which such person is not entitled under the FOIA.

Subpart O – Privacy Act Provisions

§ 212.31 Purpose and scope.

This subpart contains the rules that the USAID follows under the Privacy Act of 1974 (PA), 5 U.S.C. 552a, as amended. These rules should be read together with the text of the statute, which provides additional information about records maintained on individuals. The rules in this subpart apply to all records in systems of records maintained by the agency that are retrieved by an individual's name or personal identifier. They describe the procedures by which individuals may request access to records about themselves, request amendment or correction of those records, and request an accounting of disclosures of those records by the agency. If any records retrieved pursuant to an access request under the PA are found to be exempt from access under that Act, they will be processed for possible disclosure under the FOIA, as amended. No fees shall be charged for access to or amendment of PA records.

§ 212.32 Privacy definitions.

As used in this subpart, the following definitions shall apply:

- (a) Individual means a citizen or a legal permanent resident alien (LPR) of the United States.
- (b) Maintain includes maintain, collect, use, or disseminate.
- (c) Record means any item, collection, or grouping of information about an individual that is maintained by the agency and that contains the individual's name or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or photograph.
- (d) System of records means a group of any records under the control of the agency from which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to an individual.

§ 212.33 Request for access to records.

(a) *In general.* Requests for access to records under the PA must be made in writing and mailed to the Bureau for Management Services, Information and Records Division at the address given in §212.7.

(b) *Description of records sought.* Requests for access should describe the requested record(s) in sufficient detail to permit identification of the record(s). At a minimum, requests should include the individual's full name (including maiden name, if appropriate) and any other names used, current complete mailing address, and date and place of birth (city, state and country). Helpful data includes the approximate time period of the record and the circumstances that give the individual reason to believe that the agency maintains a record under the individual's name or personal identifier, and, if known, the system of records in which the record is maintained. In certain instances, it may be necessary for the Agency to request additional information from the requester, either to ensure a full search, or to ensure that a record retrieved does in fact pertain to the individual.

(c) *Verification of personal identity.* The Agency will require reasonable identification of individuals requesting records about themselves under the PA's access provisions to ensure that records are only accessed by the proper persons. Requesters must state their full name, current address, citizenship or legal permanent resident alien status, and date and place of birth (city, state, and country). The request must be signed, and the requester's signature must be either notarized or made under penalty of perjury pursuant to 28 U.S.C. 1746. If the requester seeks records under another name the requester has used, a statement, under penalty of perjury, that the requester has also used the other name must be included.

(d) *Authorized third party access.* The Agency shall process all properly authorized third party requests, as described in this section, under the PA. In the absence of proper authorization from the individual to whom the records pertain, the Agency will process third party requests under the FOIA. The Agency's form, AID 507-1, may be used to certify the identity and provide third party authorization.

(1) *Parents and guardians of minor children.* Upon presentation of acceptable documentation of the parental or guardian relationship, a parent or guardian of a U.S. citizen or LPR minor (an unmarried person under the age of 18) may, on behalf of the minor, request records under the PA pertaining to the minor. In any case, U.S. citizen or LPR minors may request such records on their own behalf.

(2) *Guardians.* A guardian of an individual who has been declared by a court to be incompetent may act for and on behalf of the incompetent individual upon presentation of appropriate documentation of the guardian relationship.

(3) *Authorized representatives or designees.* When an individual wishes to authorize another person or persons access to his or her records, the individual may submit, in addition to the identity verification information described in paragraph (c) or paragraph (d) of this section. The designated third party must submit identity verification information described in paragraph (c).

(e) *Referrals and consultations.* If the Agency determines that records retrieved as responsive to the request were created by another agency, it ordinarily will refer the records to the originating agency for direct response to the requester. If the agency determines that records retrieved as responsive to the request are of interest to another agency, it may consult with the

other agency before responding to the request. The Agency may make agreements with other agencies to eliminate the need for consultations or referrals for particular types of records.

(f) *Records relating to civil actions.* Nothing in this subpart entitles an individual to access to any information compiled in reasonable anticipation of a civil action or proceeding.

(g) *Time limits.* The Agency will acknowledge the request promptly and furnish the requested information as soon as possible thereafter.

§ 212.34 Request to amend or correct records

(a) An individual has the right to request that the Agency amend a record pertaining to the individual that the individual believes is not accurate, relevant, timely, or complete.

(b) Requests to amend records must be in writing and mailed or delivered to the Bureau for Management, Management Services, Information Records Division at the address given in §212.7, with ATTENTION: PRIVACY ACT AMENDMENT REQUEST written on the envelope. IRD will coordinate the review of the request with the appropriate offices of the Agency. The Agency will require verification of personal identity before it will initiate action to amend a record. Amendment requests should contain, at a minimum, identifying information needed to locate the record in question, a description of the specific correction requested, and an explanation of why the existing record is not accurate, relevant, timely, or complete. The request must be signed, and the requester's signature must be either notarized or made under penalty of perjury pursuant to 28 U.S.C. 1746. The requester should submit as much pertinent documentation, other information, and explanation as possible to support the request for amendment.

(c) All requests for amendments to records shall be acknowledged within 10 working days.

(d) In reviewing a record in response to a request to amend, the Agency shall review the record to determine if it is accurate, relevant, timely, and complete.

(e) If the Agency agrees with an individual's request to amend a record, it shall:

(1) Advise the individual in writing of its decision;

(2) Amend the record accordingly; and

(3) If an accounting of disclosure has been made, advise all previous recipients of the record of the amendment and its substance.

(f) If the Agency denies an individual's request to amend a record, it shall advise the individual in writing of its decision and the reason for the refusal, and the procedures for the individual to request further review. See §171.25 of this chapter.

§ 212.35 Appeals from denials of PA amendment requests.

(a) *How made.* Except where accountings of disclosures are not required to be kept, as set forth in paragraph (b) of this section, or where accountings of disclosures do not need to be provided to a requesting individual pursuant to 5 U.S.C. 552a(c)(3), an individual has a right to request an accounting of any disclosure that the Agency has made to another person, organization, or agency of any record about an individual. This accounting shall contain the date, nature, and purpose of each disclosure as well as the name and address of the recipient of the disclosure. Any request for accounting should identify each particular record in question and may be made by writing directly to the Appeals Officer, Bureau for Management, Office of Management Services at the address given in §212.19.

(b) *Where accountings not required.* The Agency is not required to keep an accounting of disclosures in the case of:

(1) Disclosures made to employees within the Agency who have a need for the record in the performance of their duties; and

(2) Disclosures required under the FOIA.

§ 212.36 Request for accounting of record disclosures.

(a) If the Agency denies a request for amendment of such records, the requester shall be informed of the reason for the denial and of the right to appeal the denial to the Appeals Review Panel. Any such appeal must be postmarked within 60 working days of the date of the Agency's denial letter and sent to: Appeals Officer, Bureau for Management, Office of Management Services at the address given in §212.19.

(b) Appellants should submit an administrative appeal of any denial, in whole or in part, of a request for access to the PA at the above address. The Agency will assign a tracking number to the appeal.

(c) The Appeals Review Panel will decide appeals from denials of PA amendment requests within 30 business days, unless the Panel extends that period for good cause shown, from the date when it is received by the Panel.

(d) Appeals Review Panel decisions will be made in writing, and appellants will receive notification of the decision. A reversal will result in reprocessing of the request in accordance with that decision. An affirmance will include a brief statement of the reason for the affirmance and will inform the appellant that the decision of the Panel represents the final decision of the Department and of the right to seek judicial review of the Panel's decision, when applicable.

(e) If the Panel's decision is that a record shall be amended in accordance with the appellant's request, the Chairman shall direct the office responsible for the record to amend the

record, advise all previous recipients of the record of the amendment and its substance (if an accounting of previous disclosures has been made), and so advise the individual in writing.

(f) If the Panel's decision is that the amendment request is denied, in addition to the notification required by paragraph (d) of this section, the Chairman shall advise the appellant:

(1) Of the right to file a concise Statement of Disagreement stating the reasons for disagreement with the decision of the Department;

(2) Of the procedures for filing the Statement of Disagreement;

(3) That any Statement of Disagreement that is filed will be made available to anyone to whom the record is subsequently disclosed, together with, at the discretion of the Agency, a brief statement by the Agency summarizing its reasons for refusing to amend the record;

(4) That prior recipients of the disputed record will be provided a copy of any statement of disagreement, to the extent that an accounting of disclosures was maintained.

(g) If the appellant files a Statement of Disagreement under paragraph (f) of this section, the Agency will clearly annotate the record so that the fact that the record is disputed is apparent to anyone who may subsequently access the record. When the disputed record is subsequently disclosed, the Agency will note the dispute and provide a copy of the Statement of Disagreement. The Agency may also include a brief summary of the reasons for not amending the record. Copies of the Agency's statement shall be treated as part of the individual's record for granting access; however, it will not be subject to amendment by an individual under this part.

§ 212.37 Specific exemptions.

(a) Pursuant to 5 U.S.C. 552a(k), the Director or the Administrator may, where there is a compelling reason to do so, exempt a system of records, from any of the provisions of subsections (c) (3); (d); (e)(1); (e)(4) (G), (H), and (I); and (f) of the Act if a system of records is:

(1) Subject to the provisions of 5 U.S.C. 552(b)(1); (2) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of the Act: Provided, however, That if any individual is denied any right, privilege, or benefit to which he or she would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(2) Maintained in connection with providing protective services to the President of the United States or other individuals pursuant to 18 U.S.C. 3056;

(3) Required by statute to be maintained and used solely as statistical records;

(4) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(5) Testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service, the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(6) Evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

(b) Each notice of a system of records that is the subject of an exemption under 5 U.S.C. 552a(k) will include a statement that the system has been exempted, the reasons therefore, and a reference to the FEDERAL REGISTER, volume and page, where the exemption rule can be found.

(c) The systems of records to be exempted under section (k) of the Act, the provisions of the Act from which they are being exempted, and the justification for the exemptions, are set forth below:

(1) Criminal Law Enforcement Records. If the 5 U.S.C. 552a(j)(2) exemption claimed under paragraph (c) of (216 22 CFR Ch. II - §215.13) and on the notice of systems of records to be published in the FEDERAL REGISTER on this same date is held to be invalid, then this system is determined to be exempt, under 5 U.S.C. 552(a)(k) (1) and (2) of the Act, from the provisions of 5 U.S.C. 552a (c)(3); (d); (e)(1); (e)(4); (G); (H); (I); and (f). The reasons for asserting the exemptions are to protect the materials required by executive order to be kept secret in the interest of the national defense or foreign policy, to prevent subjects of investigation from frustrating the investigatory process, to insure the proper functioning and integrity of law

enforcement activities, to prevent disclosure of investigative techniques, to maintain the ability to obtain necessary information, to fulfill commitments made to sources to protect their identities and the confidentiality of information and to avoid endangering these sources and law enforcement personnel.

(2) Personnel Security and Suitability Investigatory Records. This system is exempt under U.S.C. 552a (k)(1), (k)(2), and (k)(5) from the provisions of 5 U.S.C. 552a (c)(3); (d); (e)(1); (e)(4); (G); (H); (I); and (f). These exemptions are claimed to protect the materials required by executive order to be kept secret in the interest of national defense or foreign policy, to prevent subjects of investigation from frustrating the investigatory process, to insure the proper functioning and integrity of law enforcement activities, to prevent disclosure of investigative techniques, to maintain the ability to obtain candid and necessary information, to fulfill commitments made to sources to protect the confidentiality of information, to avoid endangering those sources and, ultimately, to facilitate proper selection or continuance of the best applicants or persons for a given position or contract. Special note is made of the limitation on the extent to which this exemption may be asserted.

(3) Litigation Records. This system is exempt under 5 U.S.C. 552(k)(1), (k)(2), and (k)(5) from the provisions of 5 U.S.C. 552a (c)(3); (d); (e)(1); (e)(4) (G), (H), (I); and (f). These exemptions are claimed to protect the materials required by executive order to be kept secret in the interest of national defense or foreign policy, to prevent subjects of investigation from frustrating the investigatory process, to insure the proper functioning and integrity of law enforcement activities, to prevent disclosure of investigative techniques, to maintain the ability to obtain candid and necessary information, to fulfill commitments made to sources to protect the confidentiality of information.

(4) Employee Equal Employment Opportunity Complaint Investigatory Records. This system is exempt under 5 U.S.C. 552a (k)(1) and (k)(2) from the provisions of 5 U.S.C. 552a (c)(3); (d); (e)(1); (e)(4) (G), (H), (I); and (f). These exemptions are claimed to protect the materials required by executive order to be kept secret in the interest of national defense or foreign policy, to prevent subjects of investigation from frustrating the investigatory process, to insure the proper functioning and integrity of law enforcement activities, to prevent disclosure of investigative techniques, to maintain the ability to obtain candid and necessary information, to fulfill commitments made to sources to protect the confidentiality of information, to avoid endangering these sources.

(5) The following systems of records are exempt under 5 U.S.C. 552a (k)(5) from the provision of 5 U.S.C. 552a (c)(3); (d); (e)(1); (e)(4) (G), (H), (I); and (f): (i) Employee Conduct and Discipline Records. (ii) Employee Relations Records.

NOTE TO PARAGRAPH (c)(5): This exemption is claimed for these systems of records to maintain the ability to obtain candid and necessary information, to fulfill commitments made to sources to protect the confidentiality of information, to avoid endangering these sources and, ultimately, to facilitate proper selection or continuance of the best applicants or persons for a given position or contract. Special note is made of the limitation on the extent to which this exemption may be asserted. The existence and general character of the information exempted will be made known to the individual to whom it pertains.

(6) Partner Vetting System. This system is exempt under 5 U.S.C. 552a (k)(1), (k)(2), and (k)(5) from the provision of 5 U.S.C. 552a (c)(3); (d); (e)(1); (e)(4)(G), (H), (I); and (f). These exemptions are claimed to protect the materials required by executive order to be kept secret in the interest of national defense or foreign policy, to prevent subjects of investigation from

frustrating the investigatory process, to insure the proper functioning and integrity of law enforcement activities, to prevent disclosure of investigative techniques, to maintain the ability to obtain candid and necessary information, to fulfill commitments made to sources to protect the confidentiality of information, to avoid endangering these sources, and to facilitate proper selection or continuance of the best applicants or persons for a given position or contract.

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